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No. 488

In The

Supreme Court of the United States

October Term, 1952

THE CALEDONIA ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY,
Appellees.

On Appeal from the United States District for the Northern District of New York

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REPLY BRIEF FOR THE CALEDONIAN ROAD IMPROVEMENT COMPANY

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In The

Supreme Court of the United States

October Term, 1952

No. 488

The Callanan Road Improvement Company,
Appellant,

v.

The United States of America, Interstate Commerce Commission and Cornell Steamboat Company,
Appellees.

On Appeal from the United States District for the Northern District of New York

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REPLY BRIEF FOR THE CALLANAN ROAD IMPROVEMENT COMPANY

Now comes the Callanan Road Improvement Company, appellant in the above-entitled cause, and files its brief in reply to the brief of the United States of America and the Interstate Commerce Commission, hereinafter for convenience called the Government, and the brief of Cornell Steamboat Company, hereinafter called Cornell.

Our reply to these briefs is set forth under the following headings:

I. The District Court was misled as to the facts and the effect of the *Seatrain* case, *infra,* in construing the provisions of Section 309(a) of the Interstate Commerce Act.

II. There is no basis for inferring that Congress intended to authorize the Commission, under Section 309(d) or any other section of the Interstate Commerce Act, to specify the scope of the service to be rendered by a water carrier.

III. There was no consent, either expressed or implied, permitting the Commission to revoke appellant's predecessor's original certificate of July 17, 1942.

IV. The Commission's characterization of appellant's operation as excluding "towage" under an attempted classification of water carriers constitutes attempted revocation of appellant's certificate.

V. Commission's finding that appellant's allowance tariff under Section 314 constituted an offer of "towage" was in error.

ARGUMENT

I.

The District Court Was Misled as to the Facts and the Effect of the Seatrain Case, Infra, in Construing the Provisions of Section 309(a) of the Interstate Commerce Act

The briefs filed by the Government and by the intervening competitor, Cornell Steamboat Company, may be treated together as it is clear that they were coordinated in preparation and general content. This is illustrated by the argument *ad absurdum* relative to passenger traffic (Government's Br. 22 and Cornell's Br. 27 and 48). This similarity also applies to the discussion of *U. S.* v. *Seatrain Lines,* 329 U.S. 424, 430-431. The inaccurate char-

acterization of this part of the Supreme Court's decision as dictum appears in the Government's brief at pages 10 and 20, and is adopted in the Cornell brief at pages 48 and 49. The serious consequence of erroneous presentation on argument of crucial facts in the sequency of Commission and court decisions involved in the present case, is shown by the following references: In its brief herein, the Government says (p. 21):

> "In *Seatrain*, the Court found that the original certificate issued to the carrier was in conformity with the operations performed during the 'grandfather' period, * * *" and "unlike the situation in the *Seatrain* case, the amendment of the Hutton certificate left Hutton free to continue the operations in which he had been theretofore engaged".

In the Cornell brief (pp. 46 and 47):

> "The 'equities' are entirely different in the two cases. In the *Seatrain* case, as the lower court points out, the Commission sought by the amended certificate to curtail severely the service which the Supreme Court said that that carrier had shown itself entitled to perform under the 'grandfather' clause and under the convenience and necessity provisions as to authorization of new service. The restriction, it was pointed out, amounted almost to a limitation of the carrier to a merely car-ferry service handling railroad cars between railroads, although its service had included port-to-port traffic originating or delivered by truck or otherwise and not confined to interchange with railroads, and there was evidence of transportation of general commodities".

The District Court relying on similar argument, said as to the *Seatrain* case:

> "But, and this is important, it also carried commodities generally" (R. 66), and further (R. 69) "Plaintiff stresses the reliance of the court in the *Seatrain* case on the proviso as preventing the limitation of

facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between 'service' as there considered and defined, and scope of operations as here provided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations 'within the scope of such certificates'; it does not authorize an expansion of operations beyond the grandfather's rights set out for subd. (a) of this section or the classification authorized by Section 304(c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary".

The fact is that the Supreme Court never found that *Seatrain* carried general commodities other than in freight cars, and its decision supporting the Seatrain's certificate was not dependent on any reexamination of prior grandfather evidence. Furthermore, before this Court in the *Seatrain* case, the Commission repeated:

> "*Seatrain* never carried commodities generally, except in the sense that such commodities may have been loaded in freight cars". 91 Law ed. 396.

In the Commission's decision in *Seatrain Lines, Inc.*, 260 I.C.C. 430, 435, 437, the Commission said:

> "* * * all traffic, other than liquid cargoes in bulk, and empty railroad cars, handled by applicant (Seatrain) has been transported in railroad cars received from or delivered to rail carriers".

It is to be noted that in the present case, there has never been evidence before the Commission in the original "grandfather" case, the hearing on transfer of the certificate or in the present proceeding relating to appellant's allowance tariff that Hutton (recipient of the grandfather certificate) had not engaged in what were

later described as "towage" operations during the grandfather period. His operations were described as follows:

> "Applicant has been in operation for thirty-seven years. He owns and manages one steam power boat of about 240 horsepower, and four barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about one hundred fifty gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet" (R. 7).

When the Commission sought to reopen the effective and final certificate of Mr. Hutton on March 7, 1944 it confined itself solely to specification of the type of vessel saying:

> "In our prior report, we did not specify the type of vessels to be used by applicant in the exercise of the authority granted" (R. 11).

and in describing the applicant's vessels in the amended certificate the Commission authorized:

> "The continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally * * *" (R. 13).

In its report on the hearing on transfer of the certificate to the present appellant, the Commission authorized precisely the same certificate with the same description of equipment (except for geographical modification) and said:

> "The transferee intends to publish a tariff establishing rates for the transportation of brick, pig iron and possibly cement. It would continue to handle its own business, with the freight of other shippers intermingled in tows, but it intends, irrespective of the exigencies of its own business, to move its revenue

> freight promptly in order to satisfy shipper requirements. If the revenue traffic is sufficiently profitable, it probably will add to its equipment. Additional tugs will be available as soon as transfer of the certificate is approved" (R. 18).

The geographical limitation accepted by the transferee (appellant) in no manner modified the scope or character of service to be rendered under the grandfather certificate, although the interveners in this proceeding were concerned primarily with competition by the transferee under the Hutton certificate with their general towing operations on the New York State canals, the Commission saying:

> "That business appears to be the predecessor's primary concern in this proceeding; and its objection to the proposed transfer herein would be largely satisfied by a limitation of the superseding certificate to the river operation and to the commodities which the transferee expects to transport" (R. 19).

We have noted that the District Court was led to misconstruction of the *Seatrain* case and the assumption that the certificate of *Seatrain* was supported by this Court because it was sustained by a history of general carriage of commodities not in freight cars. From this the District Court deduced that subsequent classification or other action of the Commission might modify or limit the scope of service under a closed grandfather certificate if no such showing of grandfather operations existed. It sustained the Commission upon the misapprehension that it was thus following the Supreme Court doctrine in *Seatrain* case and preventing a competitive expansion of appellant's service. It is submitted that the *Seatrain* decision protected the plain context of the grandfather certificate and was not, and could not have been influenced by a variation in *Seatrain's* pre-grandfather and current services. The present case does not involve the determination and the scope or extent of operations of

predecessor of the appellant before grandfather date, but rather the scope of the services contemplated by the original certificate, and whether or not the Commission was justified in revoking the certificate after it is "finally granted and the time fixed for rehearing it has passed". Appellant respectfully urges that the repeated emphasis placed by appellant on reconsideration of the grandfather provisions of Section 309(a) of the Interstate Commerce Act is contrary to the statutory authority of the Commission as found in the *Seatrain* case.

II.

There Is No Basis for Inferring That Congress Intended to Authorize the Commission, Under Section 309(d) or Any Other Section of the Interstate Commerce Act, to Specify the Scope of the Service to Be Rendered by a Water Carrier.

Appellees contend that the Commission has almost unlimited authority under Section 309(d) of the Interstate Commerce Act to frame a certificate as it pleases (Government's brief 13-29; Cornell's brief 48-50). It is contended that the Commission may under Section 309(d) "define the scope of the certificate including the character of service to be provided thereunder" (Government's Br. 14). They find this authority in the phrase of the subsection adding to the requirement that the certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate; the provision attaching to the exercise of the privilege granted "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such other terms, conditions and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part,

or those established by the Commission pursuant thereto; * * *".

They acknowledge that these terms, conditions or limitations shall not "restrict the right of the carrier to add to its equipment, facilities, *or service within the scope of such certificate*, as the development of the business and the *demands of the public* shall require * * *" or to extend its services over certain facilities incompleted at grandfather date.

The same argument was advanced in the *Seatrain* case, *supra*. In that case it was contended that under the same language the Commission could re-frame an issued certificate so as to comply with its orders, rules and regulations made thereafter "to assure appellee the substantial parity of operations in the future which it had established in the past" (*Seatrain, supra*, 424).

The Court rejected the argument and observed pointedly that although the Commission is authorized under Section 208(a) of the Act to "specify the service to be rendered" in a certificate issued to motor carriers, no such provision was included in Section 309 relating to certification of water carriers (*Seatrain, supra*, 431). This Court held in its *Seatrain* decision that "But §309, which empowers the Commission to grant certificates to water carriers, does not authorize the Commission to 'specify the service to be rendered'."

The appellees attempt to minimize the importance of this holding by an erroneous comparison of the scope of operations of Seatrain and appellant's predecessor before the grandfather date. As stated previously, the Government contends at page 21 of its brief that this Court found that the original certificate issued to Seatrain was in conformity with the operations performed during grandfather period. It is believed that the discussion under the preceding point, supported by direct references

to the Commission's decision in the *Seatrain* case and to this Court's decision, will refute those arguments. The conclusion is inescapable that if Congress had intended that the Commission should be given the right to "specify the service to be rendered" by a water carrier, that provision would have been incorporated in Section 309(d). The water carrier provisions according to this Court's decision in the *Seatrain* case, are a part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads, motor carriers and water carriers:

> "The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers" (*Seatrain*, 430).

For precisely the same reason, the absence of specific authority, service to be rendered by motor carriers may be specified but service to be rendered by water carriers may not. The comparison with Part II pointed up the lack of revocation powers under Part III because in the latter part the statute *did not* specifically authorize this power. This Court's holding that the Commission is not authorized to specify the service to be rendered in a water carrier certificate was not dictum as stated in the Government's brief but was essential to the determination of the *Seatrain* case.

It is repeated that Section 208(a) of the Act, applicable to motor carriers, is practically identical with Section 309(d) applicable to water carriers, except that in the very first phrase of section 208(a) it is required that a certificate issued to a motor carrier "shall specify the service to be rendered", following which both sections require specifications of routes to be used and include the provision for the Commission's determination of reasonable terms, conditions and limitations. The omission of revocation authority in Part III of the Act was

intentional and effective and the omission of authority to specify services from Part III of the Act is intentional and effective.

Appellees argue that such a construction would permit a common carrier by water, authorized to transport general commodities, to initiate extensive passenger transportation service. The argument is fallacious. Part III contemplates a number of statutory classifications of service. For example, the terms common carrier by water and contract carrier by water are separately defined (Section 302(d) and (e)). Certain exemption provisions describe transportation by "a water carrier of commodities in bulk and liquid cargo in bulk in tank vessels" (Section 303). The "transportation of passengers" is recognized as a separate category of service subject to certain exemption provisions (Section 303(e)). With respect to water carriage performed by carriers by railroad and motor carriers, certain terminal services are listed in connection with exemption provisions. There is, however, nowhere within Part III any provision which authorizes the Commission to control and regulate the "services to be rendered" or to establish by "rules, regulations or requirements" a limitation or restriction upon operating authority determined in a grandfather certificate.

III.

There Was No Consent, Either Expressed or Implied, Permitting the Commission to Revoke Mr. Hutton's Certificate of July 17, 1942.

The appellees avoid on brief, the basic proposition that the Commission has no authority or jurisdiction to revoke a certificate of public convenience and necessity issued to a water carrier. This proposition is conclusive, and as stated heretofore, was determined in the *Seatrain* case. Nevertheless, the District Court finds that the

claimed revocation in the present case is substantially different from that in the *Seatrain* case, and that "But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact, it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered" (R. 65).

Cornell relies heavily on the supposed consent of appellant to the limitation or revocation of its original certificate (Cornell's Br. 34-36). The Government, sidestepping the absence of jurisdiction for revocation, assumes that the amended certificate issued by the Commission on March 7, 1944 is the sole basis of appellant's present rights because Hutton failed to challenge the amendment (Government's Br. 29). Neither Hutton nor the appellant, his successor, ever consented to a reduction of the authority in the original grandfather certificate (otherwise than territorial), and neither consented to any specification of services which would diminish the scope of the originally authorized operation. The appellant has never agreed that the Commission has the right of complete or partial revocation of a final and effective water carrier certificate.

The Commission itself in public concession has agreed that it is without authority to revoke, amend or suspend water carrier certificates and permits. In each of its Annual Reports beginning with 1947, it has recommended to Congress the grant of such authority and each Congress has failed to adopt the proposed modification of the Interstate Commerce Act. In its current 66th Annual Report, the Commission reiterated its recommendation and as a result, on March 30, 1953, Chairman Tobey of the Senate Interstate & Foreign Commerce Committee,

by request of the Interstate Commerce Commission, introduced S. 1501 of the present Congress and a companion measure, H.R. 3792, was introduced by Chairman Wolverton of the House Interstate & Foreign Commerce Committee. Senator Tobey reported to the Senate in connection with the introduction of the Bill, that it was similar to a Bill introduced in the 82nd Congress which failed of passage. He further said:

> "'The need for the bill, which would authorize the Interstate Commerce Commission under certain conditions to revoke or amend certificates and permits of water carriers, arises because part III of the Interstate Commerce Act does not now provide revocation authority and procedure such as are found in part II and part IV with reference to motor carriers and freight forwarders, respectively. The United States Supreme Court, in United States v. Seatrain Lines, Inc. (329 U.S. 424), has indicated that the Commission is without authority to revoke water carrier certificates or permits in whole or in part, once they have become effective and the time fixed for requesting rehearing or reconsideration has passed.'"

We submit that the dignity of this Court is affected by the Commission's simultaneous persistence in revoking and amending the certificates of water carriers notwithstanding the *Seatrain* decision, and at the same time acknowledging before Congress the absence of its jurisdiction so to do.

The specific acts of the appellant and his predecessor Hutton which are said to imply consent, consist of the following: Hutton's original certificate, as finally effective after hearing in which its counsel participated, and report and order of the Commission, permitted operation "by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally * * *" between points specified (R. 9). It included no specification of equipment, it included no speci-

fication limiting the types of service and was in the broadest form possible as a common carrier of commodities. In this respect, it was even broader than the certificate in the *Seatrain* case which specified a particular type of equipment. Following the issuance of the Hutton certificate, the Commission in the *Eastern Transportation Company*, 250 I.C.C. 505, wherein applicant engaged in the movement of non-self-propelled vessels for shippers and other carriers sought a specification of "towage", held:

> "Towage on shippers' barges in the transportation of commodities generally is subject to part III, but special authority to applicant to perform such towage is not necessary because applicant will be authorized to engage in transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. Authority to perform such transportation does not limit applicant to the use of its own non-self-propelled vessels, and the authorization should not be interpreted as forbidding the use of other barges or scows in the transportation. In order to effectuate a flexible and coordinated transportation system, carriers of this type should be able to use non-self-propelled vessels which are chartered from others, interchanged with other carriers or owned by shippers. Separate authority to tow shippers' barges is not necessary" (pp. 507-508).

We have further covered the policy of the Commission as so announced in our opening brief, pages 14-15. In the light of this decision, Hutton's certificate was completely satisfactory and covered all of the services to which he was entitled by reason of grandfather operation. Subsequently, as we have noted elsewhere, this Court decided that carriers engaged exclusively in towage and providing no transportation, were embraced within the jurisdiction of the Commission under Part III of the Interstate Commerce Act and certificates were issued limiting such carriers to towage. Finally, in the *Campbell Transportation Company*, 260 I.C.C. 107, on December

14, 1943, preceding by four days the *Foss Launch & Tug Company* case, 260 I.C.C. 103, the Commission changed its mind and granted Campbell a separate specification of authority for general towage in addition to its grant of "commodities generally". It reiterated that it did not intend to prevent the use by carriers of commodities generally of shippers' barges as a part of their equipment (p. 110). By way of dicta, it stated:

> "Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service".

This was a Division decision. There was no industry-wide or general hearing and no order of classification was entered. The action was taken in the original grandfather case of Campbell and before its certificate became final. Nevertheless, on March 7, 1944, the Commission issued an order attempting to reopen appellant's grandfather case stating "in our prior report we did not specify the type of vessels to be used by applicant in the exercise of the authority granted". This was its sole reason for reopening. On the same day, without hearing or without further evidence as to Hutton's operation prior to grandfather date, it issued an order superseding and cancelling the certificate of July 17, 1942, and issuing an amended certificate which differed only by the addition after the words "common carrier by water" of the words "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" (R. 13). There are no other kinds of vessels. The amendment neither limited nor changed the certificate of Hutton so far as either equipment or service was involved. There was no notice of hearing or of the intention of the order such as was issued in the Seatrain case. To the lay operator, there was no reason for objection. It was as if one said "you may use all the tables in the room and everything else which is not a table". Only subsequently, when the subtleties of regulation attributed significance to speci-

fication of equipment, could it be detected that this was intended as a revocation or limitation of the original certificate. Failure to assume that the Commission was usurping jurisdiction cannot be considered consent. In like manner, the certificate issued at the conclusion of the transfer case was identical with the original certificate except for specification of all types of equipment in the amended certificate, and for the elimination of certain territory which the transferee, the present appellant, did not insist upon serving. Nowhere in this proceeding, which was the subject of hearing and extensive argument, was it suggested that there was any limitation on the scope of appellant's operations. It did not appeal from the division to the full Commission because it had no reason so to do. This cannot be construed as consent. It is to be noted that this transfer was approved subsequent to the *Seatrain* decision in which this Court held that the Commission could not rescind or restrict originally certificated grandfather services. Must a carrier assume that the Commission will ignore the Court? The only subsequent consideration or challenge of the unrestricted operating rights of the original certificate is the present proceeding, and it is certainly apparent that appellant has not consented to any modification or restriction of its authority. In fact, it has demanded in the light of revelation of the Commission's changed intention that the amendatory order specifying equipment be rescinded, if significant, and the original certificate be reissued.

Appellees refer to the recent decision of this Court in *U. S.* v. *L. A. Tucker Lines*, 344 U.S. 33 (Government's Br. 33; Cornell's Br. 37-38) in support of their contention that appellant and his predecessor have waived the right to object to the Commission's earlier illegal act. The circumstances are not similar. In the present case, the revocation of the certificate of appellant's predecessor was illegal and unauthorized. In the *Tucker* case, the Commission had jurisdiction in the premises, the objection

being procedural in that it was alleged that an Examiner presided in an earlier phase of the case who had failed to qualify under the Administrative Procedure Act. This issue was never raised before the Commission or before final determination of the case, nor was it raised in the complaint filed with the District Court on appeal to set aside the Commission's order. On the morning of the argument before the District Court, the plaintiff in the *Tucker* case raised the question as to qualifications of the Examiner for the first time. This Court held that the objection in those circumstances concerning the qualification of the Examiner came too late.

In the present case, the action of the Commission of which complaint is made, is that it exceeded its jurisdiction. There was no statutory authority for the revocation of a certificate held by a water carrier. In the first instance in which the Commission sought to impair or limit the original certificated authority, objection was made and has been pursued to this Court. The initial action of Division 4 of the Commission herein being beyond its jurisdiction and unsatisfactory, appellant filed with the Commission on December 26, 1951 [1] a petition for reconsideration by the entire Commission in which it prayed that the original certificate of July 17, 1942 "be restored to petitioner". The Commission, after consideration, denied the petition by formal order of March 17, 1952 (R. 34). The appeal to the District Court was timely and in good order, as was the appeal to this Court. The *Tucker* case is not relevant.

[1] The petition, not printed, by stipulation may be referred to. (R. 79)

IV.

The Commission's Attempted Classification of Water Carriers Constitutes Revocation of Appellant's Certificate.

Appellees stand on the District Court's selected ground of determination. This appears at R. 65 as follows:

> "But we prefer to place decision upon the broader ground of the Commission's power to make the classification it is now so extensively employing".

The classification in question is that to which reference is made in the opinion of the District Court (R. 67) where it said:

> "* * * we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of 'the details of service', but a 'just and reasonable classification of groups of carriers included in the term 'common carrier by water' or 'contract carrier by water' as the special nature of the services performed by such carriers shall require' which the Commission is expressly authorized to establish".

The sole provision as to classification of water carriers other than the general classification required by the statute is provided in Section 304(c) of the Act. This section which permits the establishment of just and reasonable classification of groups of carriers included in the terms "common carrier by water" or "contract carrier by water" is limited to such classification and reasonable rules and regulations pertaining thereto "as the Commission, after hearing, finds necessary or desirable in the public interest". Substantially identical language is included in Part II of the Act with respect to motor carriers under Section 204(b). Prior to attempting any such classification of motor carriers, the Interstate Commerce Commission by proper notice advised the industry

and all concerned of its proposals and submitted the matter to prolonged consideration. No such action has ever been taken with respect to water carriers. As indicated heretofore in connection with the *Eastern* and *Campbell* cases, *supra*, the Commission long subsequent to the issuance of the certificate in the present proceeding undertook in individual cases involving special facts to characterize certain types of service by common carriers as "freightage" or "towage". As of this date, there are no published rules and regulations applicable to these or any other special classifications of common carriers by water. The earliest date at which it was suggested that the term "common carrier of commodities generally" did not embrace "general towage" was December 14, 1943, in the *Campbell* decision. The description of towage is not related specifically to equipment, for in the *Campbell* case authority for both "freightage and towage by common carrier by non-self-propelled vessels with the use of separate towing vessels" is given the same carrier, and the physical function performed by common carriers using such equipment is the same. The classification, therefore, depends on the contractual arrangement and liabilities of the carrier and the type of charge made for its service. Indeed, it may depend on the ownership or control of the scows used in the service. No such classification was contemplated by the Act nor adopted with respect to water carriers.

In any event, it is clear that the Commission may not by *ex post facto* segregation of the "specification of the service to be rendered" restrict and limit a grandfather certificate issued in good faith and without fraud which, when issued, clearly contemplated all types of service. The classification argument is a mere devise to cover the assumption of authority to rescind and revoke issued and effective certificates in the furtherance of subsequent purposes of the Commission and in the interest of monopolistic classes of carriers.

The recent decision of the United States District Court for the District of Columbia, No. 2271-50, decided February 10, 1953, not yet reported, under the caption *Coastal Tank Lines, Inc.* v. *United States* is pertinent. This case was on appeal from the Commission (48 M.C.C. 289) in which the Commission construed a certificate authorizing the transportation of general commodities under the grandfather clause as inclusive of the transportation of petroleum products in bulk in tank trucks. It is important to note that the Commission in an appropriate proceeding following the issuance of the certificate, *Classification of Motor Carriers of Property*, 2 M.C.C. 703, had established a separate classification for the transportation of commodities in bulk in tank trucks. It had issued many certificates exclusively for this service under the provisions of Part II. Nevertheless, when confronted with a complaint urging that it deny to Charlton Bros. the right to conduct operations with tank trucks for the transportation of petroleum products in bulk, the Commission held that the original certificate issued prior to the classification contemplated the subsequent subdivisions.

An effort is made by the appellees to utilize this case as support for authority on the part of the Commission to establish special classifications. It has never been disputed by appellant that in connection with requests for new operations or extensions of existing operations of motor carriers the Commission may restrict the issued certificate to the service required by the public convenience and necessity. It is insisted as supported by the three-judge statutory court in the District of Columbia in the Coastal case, *supra*, that the establishment of such categories or classifications may not be used to rescind or revoke properly issued grandfather certificates. The decision of this Court in the *Seatrain* case preserving the integrity of such certificates is entirely consistent therewith.

V.

Commission's Finding That Appellant's Allowance Tariff Under Section 314 Constituted an Offer of "Towage" Was in Error.

In the welter of irrelevant argument, it is difficult to remember that this matter arose on a competitive tug operators' telegraphic complaint that appellant's tariff then in effect specifying the allowances to be made to shippers whose scows were used by the carrier in the transportation of their freight, constituted an offer of "towage" beyond the certificated powers of the appellant. The Commission agreed with this contention without any consideration of the reasonableness of the allowances under Section 314 of the Act. On brief here, the Government adopts this conclusion without valid supporting argument (Government's Brief Pages 12, 42). The Commission said:

> "From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioners in connection with the movement of freight in shippers' scows constitutes a towage service * * *. We conclude that the petitioner has been and is performing the service of towage without appropriate authority therefor under Section 309 of the Act, and that the rates, charges and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32).

Had the Commission found that the allowances were applicable to "freightage" and thus embraced within its most recent modification of the certificate of appellant, the case would have been terminated and the complaint of the competitor rejected. It was only because it found the services performed under the allowance provision of

the tariff to be "towage", a classification defined *after* the issuance of the carrier's certificate, that it was compelled to consider its authority to modify, amend and restrict the services authorized to be performed. In like manner, if it be determined that the carrier's use of allowances, as provided in Section 314 of the Act, is within the scope of the authority in its original or amended certificates, the case must be determined for the appellant.

It should be clear that the services performed by the appellant carrier for the shipper under the existing tariff at the time of the hearing before the Commission, were precisely the same whether or not the shipper's vessel was used in the freight movement. The ports served were the same. The commodities carried, largely brick, were the same. The same tug towed the shipper's barge in the same tow with barges owned by the carrier, and with barges leased by the carrier from other owners for use in its fleet. The rates provided were quoted in cents per one thousand brick, and were the same for all shippers. Towage rates are never so quoted, but are in hours' or days' use of the tug (*Dixie Carriers, infra,* p. 418). There was no limitation on the contractual obligation of the carrier to the shipper other than those customary for a common carrier. The only respect in which the charges to a shipper providing equipment differed from a shipper who owned no equipment or who chose to use the equipment of the carrier, is the allowance made for the use of the vessel. As indicated in appellant's original brief, Government's Brief page 44, and in *Dixie Carrier, infra,* page 420, such allowances for the provision of equipment were historically authorized for more than fifty years before passage of the Water Carrier Act as a part of common carriage in the case of rail carriers; were provided for in the Motor Carrier Act, Part II, and are authorized by Section 314 in Part III of the Interstate

Commerce Act. Such allowances subject only to the test of reasonableness were expressly authorized in *Eastern Transportation Company, supra,* page 508.

If the Commission's present conclusion is correct in finding that allowances may not be made unless the carrier utilizes "shippers' scows as part of its own equipment" (R. 32), then the allowance provision is dead. Obviously, if a scow is leased for general operations in the service of all shippers for a period of time in the fleet of a common carrier, the compensation will be rental and cannot be by way of allowance against the regular freight charges of the owning shipper. It is equally obvious that in the case of "towage", the towing carrier offers no scows but merely provides motive power with its own tug and hence could make no allowances for the use of the shipper's vessels. It is clear, therefore, that allowances for use of equipment are applicable to common carriers and not applicable to towage.

When companies operating tugs only were held subject to the jurisdiction of the Commission under Part III of the Act (*Cornell Steamboat Company* v. *U. S.*, 321 U.S. 634), the Commission was compelled to issue them grandfather certificates. It limited such certificates to towage by description of equipment and of service. Under pressure of the holders of towage certificates in successive individual cases, but never by general classification after hearing it, sought to restrict other water carriers from conducting competitive strictly towage operations. This resulted in the dicta in the *Campbell Transportation Company* case, *supra,* to the effect that the authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. These dicta in turn, led to the decision by a Division of the Commission in

Dixie Carriers, Inc., Rates and Allowances, 278 I.C.C. 417, where a tariff purporting to provide allowances for use of shippers' vessels was published by a carrier which did not in fact offer to carry the shippers' freight in its own or leased barges, and had only one dry cargo barge, otherwise employed. The forced criteria of the *Dixie* case, *supra*, a Division decision, in which neither the appellant nor the industry participated, were applied herein by Division 4 in reaching its conclusion that the service in the present case constituted towage (R. 30-32). The differences in essential facts were not considered by the Commission although urged by the carrier. For example: Dixie did not offer shippers suitable scows, only tugs. Appellant offered to transport commodities on its own scows or to provide scows, and did so in fact, even in the initial period of operation under the tariff, hauling twenty-eight scow loads in vessels furnished by it. Dixie operated in the Gulf of Mexico area where no physical or economic reason restricted the movement of cargo in both directions (*Dixie Carriers, Inc., supra*, 418). Appellant operated on the Hudson River where there was substantially no up-river movement of heavy commodities and both its own and shippers' scows normally returned empty. As an indication that the arrangement was towage, the Commission reported that the appellant when using vessels of shippers under the allowance provision "may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor" (R. 31). It is suggested that brick are normally shipped in full scow loads by the manufacturer, and that it is equally true that a tank car furnished a railroad by a shipper may not be used by the railroad for shipment of the freight of others on its return movement. In

towage, there are no barges used by the carrier and he cannot, therefore, use the barges of shippers for the commodities of others in either direction. Of course it can make no allowances. This practice of the appellant under the allowance provision of the tariff is completely consistent with common carriage authorized by its certificate.

The Commission suggests that published tariff rules applicable to barges owned or furnished by the carrier affecting free time for loading and unloading and demurrage when scows are held by the shipper, are inapplicable under the allowance provisions. Similar rules are likewise inapplicable under tank car allowances on railroads or any other allowance compensating for the supply of equipment by the shipper, for the sound and logical reason that the equipment belongs to the shipper, the maintenance is at the cost of the shipper, the carrier has no investment in, or right of use, of the equipment apart from the shipper's consignment of freight to the carrier, and any charge for demurrage would be grossly inapplicable and unreasonable. When the carrier's own barges are used, obviously any undue delays or retention of equipment by a shipper results in cost to the carrier, and must be compensated by demurrage.

The Commission makes much of the fact that "the shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him" (R. 28). The title of captain is by courtesy. All scows used by the carrier, whether it is owned, leased or provided by the shipper, have a caretaker or *bargee* aboard. He remains aboard to look to pumping, maintenance and fastenings, whether in tow during loading or in the off-season periods when the river is frozen. He does not control the arrival, departure or

movement of the vessel, and there is no evidence anywhere in this record that he conducts a transportation operation. His function and the liabilities of the carrier under common carriage and under towage, are distinguished in *William Stevens* v. *The Vessel White City*, 285 U.S. 195, 202, wherein Justice Butler stated that the respondent tug engaging in *towage* was not an insurer or liable as a common carrier but that its obligation for loss was upon proof of negligence in tort rather than contract. The fact that he is paid by the owner of the vessel is no more significant than the fact that cattle handlers on cattle cars are paid by the stock owner on a railroad. The appellant herein, contracting to move brick at a rate per thousand, has full obligations for the cargo as a common carrier unaffected by the allowances for the use of the shipper's vessel.

The District Court did not consider these important factors. It accepted the Commission's definition of the service as "towage" and said, "the Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the entire operation was illegal" (R. 70).

It is interesting to note that the District Court, having completely ignored and failed to pass upon the earnestly advocated contention of the appellant that the service performed under allowances was not towage, dismissed the appellant's contention that the Commission had violated the Administrative Procedure Act by similar failure to consider the arguments and evidence as "this objection seems to border on the frivolous, particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt" (R. 70, 71). Since proper disposition of this question would have eliminated the characterization of the operation as towage and made it entirely unnecessary to construe appellant's

certificate, it is obvious that the question is not frivolous and that the trial court was misled as to critical facts.

Examination of the Cornell Brief, Page 13, *et seq.*, is suggestive of the kind of argument the trial court encountered. Apart from the conclusion that the Commission speaks *ex cathedra* in matters of interpretation of its own decisions, intervener relies on flat misconstruction of the facts of record and innuendo to support a suggestion that the service appellant performs under the protested tariff is different than that for which it was certificated. Verification of the facts cited above, which are of record, permit only the conclusion that the allowance service is not "towage", and in any event, is contemplated by "common carriage of commodities generally".

CONCLUSION

The Court should conclude:

1. That the District Court was misled as to the facts and import of the *Seatrain* case and did not consider the essential issues.

2. That the Commission admittedly is still seeking from Congress the right to revoke or amend certificates issued water carriers under Part III of the Interstate Commerce Act and does not presently have these statutory powers.

3. That the Commission may not so specify or classify services rendered by common carriers by water of commodities generally so as to limit the scope of the operations plainly provided by final certificates of convenience and necessity.

4. That the allowances to shippers for the use of their equipment made herein are in fact an evidence of "freightage" operations and, if reasonable, are provided for in Section 314 of the Interstate Commerce Act.

5. That appellant cannot be deprived lawfully of its operating rights under the original certificate of its predecessor and may continue to conduct its operations under its presently published tariff.

Respectfully submitted,

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